92-1766

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

PAUL BRICKNER,
Petitioner

versus

GEORGE V. VOINOVICH, GOVERNOR; CHESTER A. ROUSH; WILLIAM L. PHILLIS; individually and in their official capacities, and their agents, employees, attorneys, successors in office, assistants and all persons acting in concert and cooperation with them,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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(*Petitioner is not proceeding in forma pauperis. Petitioner has been a member of the bar of this Court since 1982.)

QUESTIONS PRESENTED FOR REVIEW

1. Whether the removal from office of a member of the State Board of Education in his ninth year of service by means of two Attorney General opinions, one published and formally issued upon the request, made by motion and vote, of the State Board of Education, the other unpublished and issued upon the secret telephone request (not a written request) of the Superintendent of Public Instruction, by undisclosed legal advice provided in secret by the Attorney General to the Governor and by an appointment by the Governor of another person to the seat occupied by the elected member, rather than by following the quo warranto procedure specified in the Constitution and laws of Ohio, constitutes a violation of federally protected due process rights.

2. Whether the interpretation of the language of Section 3301.031, Ohio Revised Code, by the Ohio Attorney General, is unconstitutional in that it makes government employees second class citizens by an unconstitutional prohibition on their eligibility to serve on the State Board of Education, without rational basis, thereby denying government employees equal protection of the law.

3. Whether the language of Section 3303.031 O.R.C. precluding from membership on the State Board of Education persons who "hold any other public position of trust or profit...." is unconstitutionally vague.

4. Whether the respondents violated petitioner's First Amendment rights by punishing him for speaking out and asking question about matters clearly within the purview of his responsibilities and

duties as a member of and president of the State Board of Education.

5. Whether petitioner's removal in midterm, during his ninth year in office, violated the right of petitioner and other electors of the 11th Congressional District to chose their representative, in that the Attorney General and Governor selectively enforced a novel interpretation of a code provision that existed for 36 years and had never before been used to remove any of the many Board members who held full-time or part-time government positions, or any of the other Board members who held public positions of trust or profit, as broadly defined by the Attorney General, at the time petitioner was singled out for removal.

6. Whether the supremacy clause and the Hatch Act preclude any state action to define or prohibit what public service

activities may be performed by federal government employees.

7. Whether the District Court and Court of Appeals abused their discretion in not affording injunctive relief and reinstatement and in not granting petitioner's motion for a new trial and for leave to amend his complaint.

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safeguarded by the Constitution of the United States.

Ib. Removing an elected official and then lacing on that former official the burden of proof and the burden of going forward in seeking reinstatement violate due process.

Ic. The Governor and Attorney General should have recused themselves from serving as "hearing officers" in this case due to conflicting interests.

II. The interpretation by the Ohio Attorney General of Section 3301.031, Ohio Revised Code, has no rational basis for excluding all government employees from serving on the State Board of Education and

violates the equal protection clause.

III. The language of Section 3301.031, Ohio Revised Code, is unconstitutionally vague.

IV. Removal of an elected public official, because of the questions he asks and the opinions that he expresses, vilates the First Amendment.

V. Removal of an elected official in mid-term without following constitutionally authorized means violates the constitutionally protected voting rights of the electorate.

VI. The Hatch Act pre-empts Section 3301.031, Ohio Revised Code, because

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VII. The District Court abused its discretion in not affording injunctive relieve and ordering reinstatement and in not allowing an amended complaint and new trial.

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Paul Brickner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on October 13, 1992 and

this proceeding on October 13, 1992 and the denial of a petition for rehearing filed and entered on December 3, 1992. Petitioner has been granted an extension of the filing deadline until May 2, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 977 F.2d 235-238, and the Order denying the petition for reconsideration are reprinted in the Appendix hereto. The Memorandum of Opinion and Order Overruling Plaintiff's Motion for a Temporary Restraining Order of the District Court for the Northern District of Ohio, and the District Court's findings of fact and conclusions of law, orally given and transcribed, and ORDER OF DISMISSAL are reprinted in the appendix.

JURISDICTION

This petition for certiorari was filed within the May 2d, 1993 deadline granted by this Court. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1). Jurisdiction in the District Court was founded on Title 28 U.S.C. Sections 1331 and 1343 and in the Court of Appeals under 28 U.S.C. 1291.

STATEMENT OF THE CASE

Education, kindergarten through high school, is a $7,000,000,000.00 enterprise in Ohio, constituting approximately 1/3 of the state budget. In Ohio, thousands of ordinary citizens serve as members of the State Board of Education and more than 600 local school boards. Federal employees serve on local school boards.

All are elected by a vote of the people and perform these "thankless jobs" for little remuneration. State Boards of Education exist in 49 states. In many other states, local and state board members are elected officials. They provide accountability to the electorate for the vast education bureaucracy.

The opinion of the Sixth Circuit in this case places in jeopardy the right of those elected school board members to serve, speak out on sensitive issues, ask hard questions, and criticize their subordinates and employees without fear of vengeance, retaliation, punishment, revenge and removal. The opinion sets a terrible precedent, not only for elected school board members, but also for thousands of local elected officials who serve in low profile public service type offices (members of city councils, township trustees, etc). If the secretly

requested and prepared, unpublished letter of the Attorney General can remove an elected state official, why cannot courts say also that a county prosecutor can cause the removal of county officials and local school board members and that the opinion of a city law director/solicitor can cause the removal of mayors, city council members and local school board members?

But for this case, never in the 38 year history of the State Board of Education, has a member been removed during his term of office. The Ohio Constitution was amended in 1953 to create a State Board of Education to help eliminate excessive gubernatorial politics from the Ohio Department of education by replacing the Governor as the appointing authority of the Superintendent of Public Instruction and creating a board that would thereafter

select the Superintendent (Article VI, 4). Previously, the Governor had appointed the Superintendent. In 1955 enabling legislation was passed and the first Board was elected by a vote of the people. One member was elected from each of Ohio's 23 Congressional Districts.

The structure of good government at the Ohio Department of Education was simple. The Board members were elected by the people and were accountable to the voters. The Board set education policy and hired the Superintendent. The Superintendent effectuated the policy set by the Board and was in charge of the vast education bureaucracy of the Department, which employed some 600 to 800 people. The Superintendent was accountable to the Board.

REASONS FOR GRANTING THE WRIT

I.

Circumvention of an established "constitutionally permissible means" of removal of elected officeholders by substituting therefor an unauthorized means of removal that reduces or eliminates the officeholder's rights to notice and an opportunity to be heard violates the right to due process of law safeguarded by the Constitution of the United States.

a. Complete pre-removal process is due.

In Ohio,

> "[q]uo warranto is the exclusive remedy to try title

> to public office...." (79 O Jur3d, Quo Warranto § 5). Beasley v. City of East Cleveland, 20 Ohio App.3d 370, 373, 46 N.E.2d 859 (1984); see also, State ex rel. Albright v. Court of Common Pleas, 60 Ohio St.3d 40, 572 N.E.2d 1387 (1991).

The learned judges of the Sixth Circuit recognized that this case involves an elected public official, but they failed to draw any inferences or conclusions from that fact and merely treated removal of an elected official as if it were the full equal of termination of employment, as in an employer-employee relationship, or confused an elected official with an appointed official. Petitioner believes this neglect of the fact that petitioner was elected to serve

by a vote of the people and of the significance of quo warranto was a grave error. Public officials, including elected members of a state board of education, are employed by the people. They are not employees of the Governor, the Attorney General or the Department of Education. They are not employees of the State Board of Education. They certainly are not the employees of the Superintendent, rather the Superintendent is the Board's employee.

There is no supervisor and no personnel office that can give an elected member of Ohio's State Board of Education a termination notice. The employee termination cases provide good background to help answer the question of how much process is due. The same holds true for the fact that in Ohio teachers and administrators are entitled to due process hearings before decertification

and even contested land transfers between districts are entitled to due process hearings. Although these varying due process considerations are helpful background, they should not be dispositive of the due process required to remove an elected official.

Ohio has carefully circumscribed the means for removing an elected official, whether for wrongdoing or, as in the present case, to challenge and test the right to hold office by reason of a technicality. Since Ohio is a relatively typical state, it can be a representative example of "what process is due" in terms of the removal of an elected official from office.

Although state law does not prescribe the parameters of due process as a federal constitutional right, surely, because its jurisprudence derives

from the same fundamental Anglo-American principles, state law can be a reasonable exemplar of due process in these cases. The Sixth Circuit made no effort to consider the differences between a "mere employee", as to whom quo warranto is not available, and an elected office holder, as to whom a "pink slip" or lay off notice is not applicable.

The Supreme Court of Texas has said, "...a fundamental principle of our republican form of government is that every public officeholder remains in his position at the sufferance and for the benefit of the public, subject to removal from office by edict of the ballot box at the time of the next election, or before that time by any other constitutionally permissible means." (Tarrant County v. Ashmore, 635 S.W.2d 417, 421 (1982)).

This fundamental principle is stated in basic texts on quo warranto.

> However, a person actually obtaining office with the legal indicia of title is legally in possession thereof, and is a legal officer until ousted. Such an incumbent is an officer de facto if not de jure, that is, one who is in possession and discharging the duties thereof under color of authority. By "color of authority" is meant authority derived from an election or appointment, however, irregular or informal, so that the incumbent is not a mere volunteer. (65 Am Jur 2d, Quo Warranto, §23, Incumbency and user of the office).

The Ohio Constitution grants to the Supreme Court (Art IV §2(B)(1)(a)) and to the courts of appeals (Art IV § 3(B)(1)(a)) original jurisdiction to hear quo warranto cases. This means that the trial courts of the state are without jurisdiction to decide quo warranto cases. In other words, in Ohio removal of a seated elected official from office requires the votes of <u>at least two court of appeals judges</u>. We can infer that the constitutional authors wanted to insure that no officeholder be removed without a hearing before a panel of mature, experienced and senior judges.

The learned judges of the Sixth Circuit were wrong in stating, "The governor declared his seat vacant....", in the second sentence of the opinion. The Governor neither took nor was entitled to take such action. <u>Neither the Governor nor the Attorney General has</u>

the power or authority to "declare a vacancy". There is nothing in the law or Constitution of Ohio that authorizes either of these executive branch officers to perform what would be essentially a judicial procedure. They are without jurisdiction to undertake a declaration of vacancy in the office of a duly elected and seated public official. The District Court Judge also misapprehended this issue and believed erroneously that "the governmental actors...[could] proceed... by declaring the seat vacant and appointing someone else to fill it." No such authority exists.

Opinions of the Attorney General are merely opinions. In this case, the opinion of the Attorney General clearly was in error, because the Attorney General failed to disclose important legal authority (legislative history) directly adverse to the position he had

espoused and not brought forth by counsel for petitioner. Although the Attorney General likes to say his opinions have the force and effect of law, they can be superseded by any judge in Ohio. A municipal, county or common pleas judge can overturn the opinion of the Attorney General. Yet, under Ohio law, trial judges cannot remove an elected public official from office. Removal requires a quo warrant action in an appellate court. No where in the record is there authority for requests for Attorney General opinions to be treated as due process hearings. Nor is there authority for the opinion that it is proper or permissible to communicate with the Attorney General about a question under advisement.

We must look to the priorities and hierarchy of our governing structure. If

the opinion of the Attorney General can be overruled by a municipal or common pleas judge, and yet those judges do not have jurisdiction to hear a quo warranto proceeding, how can it be said that the Attorney General has jurisdiction to remove an elected official? Attorney General opinions are not self-enforcing or self-executing (just as the relation back doctrine in rem forfeiture cases is not self-executing, United States v. A Parcel of Land, 1993 WL 44241, 5 (U.S.)).

In a similar manner, no court has jurisdiction to hear an impeachment case under Ohio's Constitution. Impeachment for wrongdoing is by the House of Representatives with a trial by the Senate. Article II, §§ 23 & 24. The Senators must take a special "oath or affirmation to do justice according to law and evidence." Ohio's Constitution,

Art. II, § 38, provides for a statutorily created substitute for impeachment, that is, recall for misconduct. It requires a pre-removal hearing. If wrongdoers and officials accused of misconduct cannot be removed from office without a full pre-removal hearing before the Senate or a Court of law, how can the Attorney General maintain that his word can remove a seated official in his ninth year of office?

Our governmental structure, its parameters and hierarchy call for exhaustive pre-removal procedures for elected officials. Removal of elected officials is not merely the removal from office of a given individual, but also the erasing of an election by the people and removal of their chosen representative. In removal cases, extensive due process should be mandatory. In this case, the Attorney

General responded to petitioner's claim in his Court of Appeals brief that neither the Governor nor the Attorney General had the authority to remove an elected member of the State Board of Education by claiming that they did not cause the removal but that it happened by "operation of law." If they had any authority, it should have been cited chapter and verse.

In truth, and the Governor and the Attorney General acted in concert to remove petitioner from his seat on the State Board of Education, in his ninth year of service, at the behest and instigation of the Superintendent of Public Instruction and his allies on the State Board of Education. The only authority upon which the removal was based was the mistaken assumption of authority by the two highest ranking officials in the state, the Governor and

the Attorney General, whether in error or by willful malice.

Separation of powers is central to our democracy. Justice O'Connor has written:

> "The structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous[sic] society; it increases opportunity for citizen involvement in democratic processes; .... adopted by the Framers to ensure the protection of 'our fundamental liberties.' .... reduce the risk of tyranny and abuse." (Gregory v. Ashcroft, 111 S.Ct. 2395, 2399 (1991).

In doing the bidding of an entrenched bureaucrat, the Attorney General and the Governor usurped the authority of the appellate courts of Ohio and disenfranchised the voters.

b. Removing an elected official and then placing on that former official the burden of proof and the burden of going forward in seeking reinstatement violate due process.

The interest of the people in choosing public officials to serve them is contradicted by the concept of removal first with due process hearing to follow. Elected terms of office are limited. The wheels of justice often grind too slowly. A study of the failed impeachment attempts against President Johnson and Justice Chase demonstrated the importance to our democracy of the right of

officials to serve without fear of removal by those who disagree with their conduct or positions. This is even more true of part-time public service officeholders, such as school board members, who often hold other full-time positions of employment and lack the resources or time to contest removal and seek reinstatement through court action. Removing them without a full pre-removal hearing process places an additional burden on their ability to continue to serve the people. Moreover, in a close case the allocation of the burden of proof may determine the outcome of the case.

In this case, the Attorney General even stood by ready to deny to petitioner any right to seek redress in a court of law by the specious claim that petitioner's two elections were a nullity, that he had never been a member

of the Board, and that he had no rights to pursue in court. Justice White's footnote No. 5 in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 539 (1985) addresses the fallacy of that position. A good faith Attorney General's opinion might have said, this is our position, it can be contested by filing a stay in a specified tribunal and by seeking review in a specified tribunal within a stated number of days. The U.S. District Court's ruling also was in error pursuant to footnote 5.

c. The Governor and Attorney General should have recused themselves from serving as "hearing officers" in this case due to conflicting interests.

The Governor could not be objective in dealing with this case, because he had

caused a bill to be introduced and was on record as supporting legislation to give him the power to appoint the members of the State Board of Education, thereby taking away from the people the right to elect those board members. The Governor although an attorney did not exercise appropriate judgment, since he should have removed himself from the issue, had he been aware of the conflict.

The record shows that the Attorney General's office was involved in those legal matters about which petitioner inquired of the Superintendent: delays in informing the board about allegations of fraud and wrongdoing, audited findings of hundreds of thousands of dollars of misspent education dollars and nepotism. No only was the Board kept in the dark, a county prosecutor was "stonewalled" by the Auditor and Attorney General. Both Cully and Ross, the two education

assistant Attorneys General on the brief (Ross argued the case before the Sixth Circuit) appear in the record as it relates to the "known fraud" matters. Another assistant Attorney General is named in the nepotism issue. The Attorney General could not be impartial, because that office showed a bias in favor of the Superintendent. Would they accept telephone requests for legal opinions from local school superintendents seeking the removal of local school board members? Certainly not. As an interested party in these matters, the Attorney General could not exercise independent professional judgment and render legal opinion free from personal interests. Coolidge v. New Hampshire, 403 U.S. 443, 449 (1971).

II.

The interpretation by the Ohio Attorney General of Section 3301.031, Ohio Revised Code, has no rational basis for excluding all government employees from serving on the State Board of Education and violates the equal protection clause.

Ohio has no rational basis for preventing all government employees from serving on the State Board of Education. The Ohio Attorney General's opinion interpreting Section 3301.031, ORC, in that manner makes government employees second class citizens and, thereby, violates the equal protection clause. United States v. Carolene Products, 304 U.S. 144 (1938).

Had the Attorney General disclosed and followed the legislative history, a rational basis for the language would have been a simple matter. Report of the Ohio School Survey Committee (May, 1955) showed that the consensus of the committee was to exclude from membership on the State Board of Education not all government employees, but "those who hold major appointive or elective offices in the state." This language was brought to the attention of the Sixth Circuit in the Petition for Rehearing. The report also recommended, at another point, that no government employees serve on the Board. However, the legislature did not enact that recommendation. Had it wanted to, it could have done so as surely, gracefully and effectively as it eliminated school employees from serving on the Board.

Attorney General Opinion 91-001 avoided any mention of the second portion of the subject sentence in RC 3301.031 that excluded from eligibility to serve on the State Board of Education "an employee or officer of any public or private school, or a public or private college, university, or other institution of higher learning...." Had 91-001 considered the section in its entirety or the full context of the sentence, the Attorney General's office could not have reached the conclusion that it did. It concluded that the "other public position of trust or profit" language meant both officer and employee. Taking the sentence in its entirety would then have required the Attorney General to explain why the legislature used different verbiage in the two portions of the same sentence to say the same thing. Moreover, if "public position of trust or

profit" means government employee or officer, then so much of the sentence that relates to public school and public university employees would have been redundant. Surely the different verbiage in the two portions of the same sentence meant that the legislature was speaking of two different categories. Common sense, when applied to the language, suggests that a "public position" is a high office, as contrasted with "employee" or "officer".

The Attorney General's office appears to have been eager to avoid detection of any ambiguity, because ambiguity would preclude its reliance on the plain meaning rule. Recognition of some ambiguity, or even a desire to doublecheck its conclusion because they were addressing the eligibility of a nine year veteran to hold office, would have caused the Attorney General's office to

look at legislative history and intent, the 36 year history of the State Board of Education and its many members who held full-time and part-time government positions, and comparable legislation, such as that pertaining to local school boards, where federal employees seem always to have served as equal citizens in their communities. Consideration of such matters would have caused the Attorney General's office to reach the completely opposite conclusion.

III.

The language of Section 3301.031, Ohio Revised Code, is unconstitutionally vague.

The language "any the public position of trust or profit" is no where defined in the Ohio Revised Code. It is

"nebulous" language subject to numerous interpretations by men and women of ordinary intelligence. Connally v. General Construction Co., 269 U.S. 385, 391 (1926). These Attorney General opinions were requested in bad faith and issued in bad faith with the intention of silencing an elected public official and keeping him from asking questions and speaking out about misuse of taxpayer dollars and nepotism (a felony in Ohio).

One of petitioner's predecessors and one of his contemporaries on the Board were full-time government employees during their service (one was an employee of the Lake County Board of Elections, the other an employee of the Cuyahoga County Auditor). In modern day society, active people fill many roles. Of the 21 members during petitioner's tenure on the Board, at least 14 members held "any

other public position of trust or profit" as broadly defined by the Attorney General. Yet only petitioner was singled out, with laser-like efficiency, for removal.

The March Attorney General's letter is unfortunate for taking the law out of context from outdated authorities. Section 39 of M. Throop's "A Treatise on the Law Relating to Public Officers" (1892), cited in the letter, stands for the principle that it is the court which has the power to "declare" an office vacant, not an executive branch officer (Attorney General or Governor). Yet, the Attorney General cited this section for contrary authority to support the claim of "implied resignation."

IV.

Removal of an elected public official, because of the questions he asks and the opinions that he expresses, violates the First Amendment.

As a member of the bar with prosecuting and law enforcement experience at the Federal, state and local levels, including fraud prosecutions, it was natural that petitioner, during his tenure as Board President, would follow up on a matter that involved more than $400,000.00 of misspent education dollars and which had taken place in petitioner's district.

The legislature had charged the Board with the responsibility of decertifying school officials and teachers for wrongdoing or negligence.

"Known fraud" took place in one district between 1982 and 1987. The State Auditor completed a year long investigation and audit report in the spring of 1988. The State Board was not informed of any details of the matter until March 1990, despite knowledge of the problem by the Department of Education in early 1987 and by the Attorney General's office, at least as early as April 1989, when an F.B.I. agent wrote to Chris Culley about "known fraud." The extraordinary delay in informing the Board raises questions about obstruction of justice and obstruction of official business. Board members have responsibilities. This was an area for the Board's purview. The Superintendent and Attorney General were obligated to keep the board informed. In asking questions and speaking out, petitioner was doing so as an elected official on matters of general interest

and of wrongdoing certified by the Auditor that had taken place in the district from which he was elected. Bond V. Floyd, 385 U.S. 116 (1966).

Secondarily, as a member of the bar, it was natural that petitioner's attention would be caught by legal matters. When petitioner, during his service as President of the State Board of Education, learned that there is a law against nepotism in Ohio (with a felony penalty), it was in accord with his responsibilities that he would ask the Superintendent why the Superintendent had not told the State Board of Education about the existence of a nepotism law at the time, some two years earlier, he had informed the Board that his son had been hired by the Department of Education, would ask how his son's employment squared with the nepotism law, and would

ask for copies of any research or legal opinions.

V.

Removal of an elected official in mid-term without following constitutionally authorized means violates the constitutionally protected voting rights of the electorate.

Reynolds v. Sims, 377 U.S. 533 (1964) and other cases address the fundamental right of citizens to vote in our democracy. That right is meaningless if the elector's choice can be removed summarily by edict.

VI.

The Hatch Act pre-empts Section 3301.031, Ohio Revised Code, because state law frustrates a Federal purpose.

The Supremacy Clause and the Hatch Act, 5 U.S.C. Section 7321 et seq., set the parameters for "outside" activities by Federal employees. State law cannot restrict Federal employees from exercising their rights to participate fully in our democracy, merely because they are Federal employees.

VII.

The District Court abused its discretion in not affording injunctive relieve and ordering

reinstatement and in not allowing an amended complaint and new trial.

Deprivation of constitutional rights constitutes irreparable injury. Elrod v. Burns, 427 U.S. 373 (1976). In the interests of justice, leave to amend a complaint should be freely granted. Foman v. Davis, 371 U.S. 178 (1962). This case was "instinct" with First Amendment considerations. They were heard and tried. Amending the pleadings would merely have caused them to coincide with the evidence and arguments.

CONCLUSION

This case is instinct with First Amendment considerations and addresses the right of elected public officials to speak out, ask difficult questions and perform their responsibilities to the public without fear of revenge, retaliation or removal. The case also provides insight into the difficult issues of accountability for our bureaucracies and of agency action that evades judicial review. It demonstrates the chilling effect on our democracy of prolonged, unauthorized procedures to remove an elected official by circumventing the required judicial process. When an elected school board member is chased out of office for asking questions about falsification of fiscal records and waste of our education tax dollars on dog obedience training, only

the courts can tell the bureaucrats and executive branch officers that they have overstepped the rights of free citizens, rights protected by and enshrined in our Constitution.

Respectfully submitted,

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APPENDIX

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18. Brickner's treatment by Voinovich shoddy, editorial, Lake County, Sep.26, 1991 101a

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Case No: 91-4196: 92-3098, United States Court of Appeals, Sixth Circuit, ORDER, Paul Brickner, Plaintiff-Appellant, v. George V. Voinovich, Governor; Chester A. Roush; William L. Phillis, In their official capacities and their agents, employee,s attorneys, successors in office, assistants and all persons acting in concert and cooperation with them, Defendants-Appellees.

BEFORE: MERRITT, Chief Judge,; MILBURN and GUY, Circuit Judges.

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

Filed Dec 03 1992

Leonard Green, Clerk

Paul BRICKNER, Plaintiff–Appellant,

v.

George V. VOINOVICH, Governor; Chester A. Roush; William L. Phillis; Individually and in Their Official Capacities, and Their Agents, Employees, Attorneys, Successors in Office, Assistants and All Persons Acting in Concert and Cooperation With Them, Defendants–Appellees.

Nos. 91–4196, 92–3098.

United States Court of Appeals, Sixth Circuit.

Argued Aug. 13, 1992.

Decided Oct. 13, 1992.

Rehearing Denied Dec. 3, 1992.

Former member of Ohio Board of Education brought action under § 1983, alleging violation of procedural due process in connection with his removal. The United States District Court for the Northern District of Ohio, Alvin I. Krenzler, J., dismissed, and member appealed. The Court of Appeals, Merritt, Chief Judge, held that adequate state mechanisms existed to provide due process.

Affirmed.

1. Constitutional Law ⇐277(2), 278.4(3, 5)

To trigger due process inquiry in connection with loss of public employment, three factors must be considered: some substantive right—life, liberty or proper-

ty—must be at stake; some deprivation of that substantive right must occur; and deprivation must occur without due process. U.S.C.A. Const.Amend. 14.

2. Constitutional Law ⇐251.5

If process for deprivation of substantive right is adequate, no due process violation has occurred. U.S.C.A. Const.Amend. 14.

3. Constitutional Law ⇐278.5(4)

Schools ⇐47

Available state procedures provided all process that was due in connection with removal of member of Ohio Board of Education from his elected position, despite his claim that he was not afforded adequate opportunity for hearing; member could have instituted state court declaratory judgment action during five-month period after receiving Attorney General's letter concluding that he could be deemed to have vacated his post by operation of law, and Ohio law provided for posttermination judicial proceedings to review challenge to one's title to public office in form of quo warranto action. Ohio R.C. § 2733.06.

4. Constitutional Law ⇐255(1), 278(1.1)

Essence of due process is that deprivation of property or liberty interest must be preceded by notice and opportunity for hearing "appropriate" to nature of case; what form of hearing is "appropriate" depends in large part upon timing of hearing, i.e., whether it is given before or after deprivation occurs. U.S.C.A. Const. Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

5. **Constitutional Law** ⇐275(1)

Essential ingredients of pretermination hearing for due process purposes, i.e., oral or written notice, explanation of employer's evidence, and opportunity for employee to present his side of story, do not require full evidentiary, adjudicatory hearing, which is primary function of posttermination proceedings. U.S.C.A. Const.Amend. 14.

6. **Appeal and Error** ⇐179(1)

Arguments which were not pleaded, or adequately raised or preserved in district court were waived on appeal.

Paul Brickner, pro se.

Harlan D. Karp (argued and briefed), Seiker & Furber, Cleveland, Ohio, for plaintiff-appellant.

Patrick A. Devine (briefed), Christopher M. Culley, Office of the Atty. Gen. of Ohio, Columbus, Ohio, Lauren M. Ross (argued), Columbus, Ohio, for defendants-appellees.

Before: MERRITT, Chief Judge; MILBURN and GUY, Circuit Judges.

MERRITT, Chief Judge.

This section 1983 case arises from the removal of the plaintiff, a full-time federal official, from his elected seat on the Ohio Board of Education. The governor declared his seat vacant and replaced him. The plaintiff's principal challenge to his removal concerns whether the defendants'

actions, which were implemented without a formal predeprivation hearing, violate procedural due process. We hold that adequate state mechanisms existed to provide due process to the plaintiff, and so we affirm the judgment of the District Court.

Plaintiff Brickner has been an administrative law judge with the Social Security Administration since 1981. In 1982 Brickner was elected to serve in a state-wide election as a member of the Ohio Board of Education. He requested and received permission from the federal government to serve in this elected, part-time position. He was reelected for a second term in 1988 and subsequently served as vice president and president of the Board.

The Ohio statute specifying the qualifications and salary of Board of Education members states that a board member "shall not during his term of office hold any other public position of trust or profit." Ohio Rev.Code § 3301.031 (Baldwin 1988).[1] While serving as the Board President, the plaintiff criticized and reprimanded the State Superintendent of Public Instruction, Walter, for allegations of nepotism and mismanagement of public funds. Soon

1. The statute reads in pertinent part:

3301.031 Qualifications and salary of members

Each member of the state board of education shall be a qualified elector residing in the territory composing the district from which he is elected, and shall be nominated and elected to office as provided by Title XXXV of the revised Code. A member of the board shall not during his term of office hold any other public position of trust or profit, or be an employee or officer of any public or private school, or a public or private college, university, or other institution of higher education....

thereafter another Board member, Shaffer, sharply questioned the plaintiff's entitlement to serve on the Board because of the provisions of § 3301.031 and his position as an ALJ. The application of this statute's "public position of trust" language had never been called into question before. The majority of the board, including Brickner himself, therefore voted to seek an Attorney General opinion to clarify the application of § 3301.031 to a person in Brickner's situation. Brickner himself wrote the letter requesting this advisory opinion to the state Attorney General.

The outgoing Attorney General issued an opinion in January 1991. He concluded that an ALJ held a "public position of trust" under the statute and that a board member may not simultaneously serve as an ALJ. *See* 91 Op.Ohio Att'y Gen. 001 2-5 (1991). Afterwards Superintendent Walter wrote the new Attorney General and asked whether Brickner could remain in office. The Attorney General responded in March 1991 that under Ohio common law, the acceptance by an officer of a second office incompatible with the first was equivalent to "an implied resignation or abandonment." The Attorney General concluded that the plaintiff could be deemed to have vacated his post by operation of law. After receiving this letter Walter wrote the Governor, defendant Voinovich, and asked him to appoint a replacement to Brickner's position within thirty days. The Governor delayed for approximately five months, and the plaintiff continued to serve on the Board until August 1991. In that month, the Governor finally appointed a replacement. Brickner was stricken from the Board's membership roster by defendant

Roush, his successor as Board President, after Brickner initiated this suit under 42 U.S.C. § 1983 in federal district court.

The plaintiff sought declaratory and injunctive relief, including reinstatement, against the defendants in their individual and official capacities. The District Court dismissed Brickner's suit after a hearing on a preliminary injunction. The court later denied the plaintiff's motions for a new trial and to amend his complaint to incorporate various additional constitutional arguments. This Court has jurisdiction under 28 U.S.C. § 1291.

[1–3] The plaintiff's principal argument on appeal concerns whether his removal from his elected position violated the Due Process Clause by depriving him of property, in the form of his elected office for a term fixed by statute, without affording him an adequate opportunity for a hearing. To trigger this inquiry into due process, three factors must be considered: (1) some substantive right—life, liberty or property—must be at stake; (2) some deprivation of that substantive right must occur; and (3) the deprivation must occur without due process. If the process for the deprivation is adequate, then no due process violation has occurred. *See generally Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 1492, 84 L.Ed.2d 494 (1985); *Board of Regents v. Roth*, 408 U.S. 564, 569–70, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972). In *Vicory v. Walton*, 721 F.2d 1062 (6th Cir.1983), *cert. denied*, 469 U.S. 834, 105 S.Ct. 125, 83 L.Ed.2d 67 (1984), we explained:

Policy considerations do not require a federal hearing in procedural due process

> cases that can be corrected in state court.... Section 1983 was not meant to supply an exclusive federal remedy for every alleged wrong committed by state officials. Rather, the statute is a remedy for only those wrongs which offend the Constitution's prohibition against property deprivations without procedural due process. Thus we hold that in section 1983 damage suits claiming the deprivation of a property interest without procedural due process of law, the plaintiff must plead and prove that state remedies for redressing the wrong are inadequate. In a procedural due process case under section 1983, the plaintiff must attack the state's corrective procedure as well as the substantive wrong.

Vicory, 721 F.2d at 1065–66. Assuming without deciding that a sufficient property interest is present to trigger due process analysis, it is clear to us that the available state procedures provided all the process that was due under *Loudermill* and our Court's precedents.

[4, 5] The essence of due process is that a deprivation of a property or liberty interest must "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950); *see also Loudermill*, 470 U.S. at 546, 105 S.Ct. at 1495. What form of hearing is "appropriate" depends in large part upon the timing of the hearing, *i.e.*, whether it is given *before* or *after* the deprivation occurs. The Supreme Court has held that, depending on the circumstances, a pre-termination hearing, although necessary, may not need to be elaborate, as long as the

plaintiff is entitled to a full hearing with the possibility of judicial review at the post-termination stage. *See Loudermill*, 470 U.S. at 545–47, 105 S.Ct. at 1495–96. The Supreme Court and this Court have specified that the pre-termination hearing's essential ingredients are oral or written notice, an explanation of the employer's evidence, and an opportunity for an employee to present his side of the story. These essential elements do not require a full evidentiary, adjudicatory hearing, which is the primary function of a posttermination proceedings. *Id.* at 546, 548, 105 S.Ct. at 1496; *Duchesne v. Williams*, 849 F.2d 1004, 1006–07 (6th Cir.1988) (*en banc*). The full, post-termination adjudicatory hearing serves "to ferret out bias, pretext, deception and corruption" in scrutinizing the decision to discharge or remove a potential plaintiff. *Duchesne*, 849 F.2d at 1008.

In this case, the plaintiff himself, as Board President, made the official request for an Attorney General's advisory opinion concerning his continued ability to serve on the Board. The plaintiff's own letter shows his knowledge of the threat to his further membership on the Board. He clearly had notice of the situation. He had an opportunity to offer any arguments or material relating to the issue which he raised in his letter to the Attorney General. After receiving the new Attorney General's letter in March 1991, the plaintiff was allowed to stay on the Board for approximately five months. No Ohio authority is cited that mandates that the plaintiff could not have instituted on his own an action in state court for a declaratory judgment on the effect of § 3301.031 at some time dur-

ing these five months. Brickner therefore was on notice of the problem and had a sufficient opportunity to make his position known to satisfy the pre-termination requirements of *Duchesne v. Williams, supra*.

Ohio law specifically provided for post-termination judicial proceedings to review a challenge to one's title to public office in the form of a *quo warranto* action. *See* Ohio Rev.Code § 2733.06 (Baldwin 1988). This action was available to both the plaintiff, after he was deprived of his position, and to the state government. *See e.g., State v. Staten*, 25 Ohio St.2d 107, 54 O.O.2d 235, 267 N.E.2d 122, 124–25 (1971) (noting availability of *quo warranto* action to state government). Brickner did not bring such an action after the Attorney General opinion was released or after he was removed, nor has he been able to establish that such a proceeding before an impartial state judge would not have afforded him due process after the deprivation occurred. We are therefore satisfied that Ohio's procedures provide adequate opportunities for pre-termination and post-termination hearings in order to meet basic due process requirements under *Loudermill, Duchesne* and *Vicory*.

[6] The plaintiff also raises several additional constitutional and statutory issues. These claims relate to First and Fourteenth Amendment void-for-vagueness doctrines, the exercise of First Amendment protected speech, the infringement of his constituents' right to vote through his removal, and § 3301.031's violation of the Supremacy Clause and the doctrine of preemption.

None of these arguments were pleaded, or adequately raised or preserved in the District Court. Consequently, they are waived on appeal. *See generally Brown v. Crowe*, 963 F.2d 895, 897–98 (6th Cir.1992); *Taft Broadcasting Co. v. United States*, 929 F.2d 240, 243–44 (6th Cir.1991); *Estate of Quirk v. Commissioner*, 928 F.2d 751, 757–59 (6th Cir.1991). We have reviewed the plaintiff's other contentions and find them to be without merit.

Accordingly, the judgment of the District Court is AFFIRMED.

United States District Court, Northern District of Ohio, Eastern Division, Paul Brickner, Plaintiff vs. George Voinovich, Chester A. Roush, William L. Phillis, Defendants. Senior Judge Alvin I. Krenzler, Case No. 1:91CV1712

ORDER OVERRULING MOTION FOR NEW TRIAL

This court found for the defendants and against the plaintiff and made its findings a fact and conclusion of law orally and on the record from the bench and entered judgment for the defendants.

The plaintiff filed a motion for a new trial under rule 59 of the Federal Rules of Civil Procedure raising the same issues that were raised in the initial complaint.

This court made its findings of fact and conclusions of law on the record in an open court and entered its judgment. The plaintiff has submitted no new or additional material, either factual or legal that would warrant a new trial. Therefore, the plaintiffs motion for a new trial is overruled.

/s/ Alvin I. Krenzler

UNITED STATES SENIOR DISTRICT JUDGE

Paul Brickner

Christopher Culley

Patrick Devine

[handwritten marginal entry order]

Plaintiff's Motion for a new trial overruled - Judge Alvin I. Krenzler, 12-10-91

United States District Court, Northern District of Ohio, Eastern Division, Paul Brickner, Plaintiff vs. George Voinovich, et al., Defendants, Case No. 1:91CV1712, Judge Alvin I. Krenzler.

PLAINTIFF'S MOTION FOR NEW TRIAL

This Court should grant Plaintiff's Motion for a New Trial under Fed.R.Civ.P. 59 for the following reasons:

1. Plaintiff's summary removal from office violates his constitutional rights to Freedom of Speech, Due Process, and Equal Protection of the Laws under the federal Constitution;

2. The language of Ohio Rev. Code § 3301.031, "any other public position of trust or profit," is void for vagueness and overbreadth. This language has been selectively and invidiously enforced against Plaintiff in retaliation for the content of his "speech" on matters of public concern as a public official;

3. Defendants' construction of this language conflicts with the Supremacy Clause of the United States Constitution, and is preempted by federal law regulating federal civil service employment;

4. Plaintiff's summary removal violates provisions of the Ohio Constitution, particularly Article II, § 38.

5. The voters of the Eleventh District have been deprived of their elected representative;

United States District Court, Northern District of Ohio, Eastern Division, Paul Brickner, Plaintiff vs. George Voinovich, Chester A. Roush, William L. Phillis, Defendants. Judge Alvin I. Krenzler, Case No. 1:91CV1712

ORDER OF DISMISSAL

This Court, having conducted a hearing and having made its findings of fact and conclusions of law in open court and on the record, hereby dismisses the plaintiff's complaint against all the defendants, with prejudice.

Plaintiff to pay costs.

/s/ Alvin I. Krenzler

UNITED STATES DISTRICT JUDGE

Steven Steinglass

Patrick Devine

Christopher Culley

United States District Court, Northern District of Ohio, Eastern Division, Paul Brickner, Plaintiff vs. George Voinovich, et cetera, et al., Defendants, Case No. 1:91CV1712

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS BEFORE HONORABLE ALVIN I. KRENZLER, ON FRIDAY, NOVEMBER 15TH, 1991, COMMENCING AT 10:30 A.M.

APPEARANCES:

FOR THE PLAINTIFF:	Steve Steinglass Professor of Law
FOR THE DEFENDANTS:	Patrick A. DiVine Lauren Ross Rob Zimmerman Assistant

Attorneys

General

OFFICIAL COURT REPORTER: George J. Staiduhar

THE COURT: Okay. For the record, this is a Title 42 Section 1983 case in which the Plaintiff alleges his constitutional rights were violated without due process of law, vested constitutional right being a member of the State Board of Education.

He claims he was denied due process and that he didn't get a pretermination notice, an opportunity to be heard.

Normally, a person who has a job or has vested rights is entitled to both a pretermination notice and a post termination proceedings, and the

Defendants raise the issue whether the Plaintiff has a vested property right.

They say he was not qualified for the office because he had a position of profit and trust, and RC 3301.031 provides that a member of the State Board of Education cannot hold a position of profit or trust.

Mr. Steinglass, Plaintiff's counsel, says the statute is, at best, ambiguous and this should be decided in State Court. He criticizes the State for not going the quo warranto route.

The Defendants say that 3301.031 is clear and unambiguous and that no member of the Board of Education of the State can hold a position of profit or trust, whether it be local, Federal or State.

I find that if Mr. Brickner did have a vested property right that he did not

get the appropriate pretermination notice required under Laudermill and any of the other cases.

However, I find that 3301.031 is clear an unambiguous and that Mr. Brickner, being a member of the State Board of Education and also an Administrative Law Judge in the Social Security Administration, could not and was not eligible to be a member of the State Board of Education.

Obviously, he can circulate petitions and get elected, but once that happened, he wasn't eligible to take the oath or sit as a member. Therefore, he did not have a vested right. If he didn't have a vested constitutional right, he was not entitled to any kind of due process or couldn't at least argue that he had a violation of his

constitutional rights or denial of procedural due process.

Therefore, I am going to dismiss the Plaintiff's complaint. And I invite you to test this out in the Sixth Circuit because I think it is an important issue and you articulated it very well, Mr. Steinglass. And they will have a good enough record to know what we talked about when we get it up there. Thank you. (Hearing concluded at 12:00 o'clock.)

United States District Court, Northern District of Ohio, Eastern Division, Paul Brickner, Plaintiff vs. George Voinovich, etc., et al., Defendants, Judge Alvin I. Krenzler, Case No. 1:91CV1712

Memorandum of Opinion and Order Overruling Plaintiff's Motion for a Temporary Restraining Order

In this case, the admitted facts are that plaintiff, Paul Brickner, is a full-time federal employee, being an Administrative Law Judge. He has been and is currently a member of the State Board of Education, having been elected by the voters of the 11th Congressional District.

A question was raised sometime ago concerning the eligibility of plaintiff

Brickner to serve as a member of the State Board of Education.

On January 8, 1991, the Attorney General of the State of Ohio issued Opinion No. 91-001 to Paul Brickner, President of the State Board of Education. In this opinion, the Attorney General concluded that a person who serves as an Administrative Law Judge in the United States Social Security Administration holds a "public position of trust or profit" within the meaning of Ohio Rev. Code Ann. § 3301.031 and that such a person is prohibited from simultaneously serving as an Administrative Law Judge of the United States Social Security Administration and the Ohio State Board of Education.

The statute relied on by the Attorney General is Ohio Rev. Code Ann. § 3301.031 which states, in substance,

that a member of the State Board of Education shall not, during his term of office, hold any other public position of trust or profit.

Subsequently, on March 7, 1991, the Attorney General of the State of Ohio wrote a letter to Franklin B. Walter, the Superintendent of Public Instruction for the State of Ohio, which states, in substance, that if a person is serving as an Administrative Law Judge and has been elected to the State Board of Education, he cannot serve as a member of the State Board of Education and simultaneously as an Administrative Law Judge. Under these circumstances, the Attorney General concluded that the office as a member of the State Board of Education is vacated by implied resignation or abandonment and that the official is no longer entitled to vote or receive compensation as a

member of the State Board of Education. He further notes that Ohio Rev. Code Ann. § 3301.06 provides that the Governor shall, within a period of 30 days, appoint a qualified person to fill such a vacancy until the next general election at which members of the State Board of Education are elected.

On March 27, 1991, the State Auditor notified plaintiff that he was placing a hold on any and all compensation and expense warrants due him as a member of the State Board of Education, based on the Attorney General's opinion No. 91-001.

Based on all of the foregoing, the Governor appointed a successor to the plaintiff to represent the 11th Congressional District on the State Board of Education.

Plaintiff brought the present action contending that his constitutional property right to retain his seat on the State Board of education was violated without due process and in violation of the Fourteenth Amendment to the United States Constitution.

In this case, the plaintiff contends that he has a vested property interest in the position of being a member of the school board of the State of Ohio representing the 11th Congressional District and that this property right was taken away from him by governmental action without due process of law.

Plaintiff contends that if there was a question concerning his qualifications to serve, a quo warranto action should have been brought against him which, in effect, would challenge his right to serve. Ohio Rev. Code Ann. § 2733.01.

Under the facts in this case, the Governor and the Attorney General could have proceeded in at least one of several ways.

Normally, when a person is allegedly holding office illegally, a quo warranto action could be filed. The gist of this action is to ask the question: by what authority are you serving? In other words, there is a challenge to a person's holding office to show by what authority that person is holding office.

This litigation will be brought in state court and, during its pendency, the person having been elected to the office would retain it and, in all probability, would continue to retain it during the pendency of the litigation and until it was finally concluded.

Another way for the governmental actors to proceed would be, as was done

in this case, by declaring the seat vacant and appointing someone else to fill it. This would then place the burden on the deposed officeholder to take some action, either by his or her own quo warranto action challenging the right of the successor to hold the position, or bringing an action similar to what was brought in this case.

In either of these latter events, in all probability the elected person, such as plaintiff, would not hold the position during the pendency of the case and the newly appointed person would hold it during the pendency of the litigation. Thus, we see a contrast in the two methods of procedure. In the first scenario, the elected person would continue to hold the office or position until the case was concluded and, in the latter one, the successor-appointee would

continue to hold the position, at least during the pendency of the litigation.

The two principal issues to be decided in the case before this Court are whether the plaintiff had a vested property right, and if so, was he denied due process.

It is the plaintiff's position that he did have a vested property right and that it was taken away from him without due process. The state's position is that he did not have a vested property right and, therefore, there was not an unconstitutional taking away of that property right without due process.

It must be noted that in all of the foregoing alternatives the issues to be decided are whether the state law, Ohio Rev. Code Ann. § 3301.031, precludes the plaintiff from sitting on the State Board of Education while he serves in his

federal capacity. In other words, is his position as an Administrative Law Judge a position of profit or trust which would preclude him from sitting on the State Board of Education? Obviously, this is the same issue that would be decided in the quo warranto case in state court, or in this case involving his property rights.

As an aside, this Court notes that all persons in public or private life are faced with alternatives. In this case, the state actors, namely, the Attorney General and the Governor, in concert, chose the route of declaring the seat vacant and having the Governor make a new appointment. They could have proceeded in quo warranto, but they did not. This Court cannot tell government officials which of the various alternatives they must take. This Court can only deal with

the case before it, and that is whether this plaintiff had a constitutional right to his position and whether it was taken away without due process.

This Court would be remiss if it did not also note that the normal, well-accepted practice is to give notice and an opportunity to be heard before people are removed from their positions. It cannot be accepted as good practice to have people in authority merely remove people and appoint a successor and then place the burden on that person to litigate to reclaim the position from which they have been deposed, even if the state actor is right.

This removal process without prior proceedings or litigation could lead to abuses, in that arbitrary public officials could arbitrarily and wrongfully remove people and then place

the burden on that person to reclaim the position. It may then take several years to go through the court system to reclaim the position and be successful. This system may arguably be satisfactory if the government official is right but it could lead to abuses in the event that the government official ultimately is wrong.

But, in any event, we must deal with the present case. Civil Rule 65 provides for a temporary restraining order. In order to obtain a temporary restraining order, the plaintiff must demonstrate the following elements: (1) the plaintiff has a substantial likelihood of success on the merits; (2) the plaintiff has no adequate remedy at law; (3) an irreparable harm may occur unless the temporary restraining order is issued; and (4) the irreparable harm the

plaintiff will suffer if the temporary restraining order is not issued outweighs the irreparable harm the defendant will suffer if the temporary restraining order is issued. A temporary restraining order may be granted for 10 days and may be renewed for an additional ten days or a total of 20 days.

It is noted that the State Board of Education meets once a month. This Court has scheduled this matter for a hearing on a permanent injunction and the merits of this case, on November 15, 1991, which has been on an expedited basis.

To give this plaintiff a temporary restraining order would allow him to sit as a member of the Board of Education for the September 1991 meeting. After that, he would not be able to sit. So, to give the plaintiff a temporary restraining order would be meaningless gesture. The

state actors, the Governor and the Attorney General, have taken their action. The plaintiff has brought this litigation and this Court will process this case as expeditiously as possible to answer the principal question of whether this plaintiff had a constitutionally vested right in the position and whether it was taken away without due process. As stated before, this is the same issue that would be resolved in the quo warranto case.

Obviously, as a federal court, we would prefer to have these types of matters resolved in state court, and the better procedure would have been to bring the quo warranto action either before or after the removal.

Because this Court is dealing with a substantive due process issue, the fact that the plaintiff may have an adequate

remedy in state court does not deny jurisdiction to this Court to process and conclude this case. This Court has concluded that the plaintiff has not met all the elements required in order to issue a temporary restraining order.

Based on all of the foregoing, the motion for a temporary restraining order is overruled. This case is scheduled for a hearing on the merits on November 15, 1991 at 9:30 a.m.

[Letterhead of Attorney General Lee Fisher]

March 7, 1991

Franklin B. Walter,
Superintendent of Public Instruction
Department of Education
65 South Front Street
Room 808
Columbus, Ohio 43215

Dear Superintendent Walter:

You have asked my opinion with respect to the effect of 1991 Op. Att'y Gen. No. 91-001 on the status of an individual concurrently serving as a member of the State Board of Education and as an administrative law judge with the United States Social Security Administration. Specifically you wish to know whether such an individual may

continue to vote and to receive compensation as a member of the board.

As you are aware, in Op. No. 91-001, my predecessor held that the position of administrative law judge is a "position of trust or profit" within the meaning of R. C. 3301.031. Accordingly, R.C. 3301.031, which states that a "member of the board shall not during his term of office, hold any other public position of trust or profit," presents a statutory bar to membership on the board while holding the position of administrative law judge.

The general common law rule governing such situations is that "the acceptance by a officer of a second office which is incompatible with the one already held is a vacation of the original office and amounts to an implied resignation or abandonment of the same."

State ex rel. Witten v. Ferguson, 148 Ohio St. 702, 707-08, 76 N.E.2d 886, 890 (1947) (citations omitted); accord State ex rel. Hover v. Wolven, 175 Ohio St. 114, 191 N.E.2d 723 (1963). This rule has been found applicable "whether the incompatibility is based on common law or by reason of a constitutional mandate, or because of an express statutory direction." State ex rel. Baden v. Gibbons, 17 Ohio Law Abs. 341, 346 (Ct. App. Butler County 1934) (emphasis added).

It has long been recognized that the effect of the above rule is reversed, however, when the second office is a state office and the first is conferred by federal authority. F. Mechem, Public Offices and Officers §430 (1890); M. Throop, A Treatise on the Law Relating to Public Officers §39 (1892). Because

state law cannot control the qualifications for federal offices or employments, the statutory declaration of incompatibility can only operate to vacate the state office.

Ohio case law also recognized an additional exception to the general rule of forfeiture of the first two incompatible offices. Where an individual holding an office is elected or appointed to another office subject to a legislative prohibition against holding both offices, the election or appointment to the second office is a nullity and the individual retains title to the first office. See State ex rel. Gettels v. Gillen, 112 Ohio St. 534, 148 N.E. 86 (1925) (syllabus); State ex rel. Attorney General v. Craig, 69 Ohio St. 236, 69 N.E. 228 (1903) (syllabus, paragraph one); State ex rel. v. Kearns, 47 Ohio

St. 566, 25 N.E. 1027 (1890) (syllabus, paragraph five); 1960 Op. No. 1086 at 7-9. In such an instance, the second office is determined vacant without necessity of any proceedings against the claimant. See State ex rel. Shank v. Gard, 8 Ohio C.C. (n.s.) 559 (Cir. Ct. Butler County 1906), aff'd, 75 Ohio St. 606, 80 N.E. 1133 (1906).

Accordingly, when the state board of education determines that a member is concurrently serving as an administrative law judge, that member's office must be deemed vacated by implied resignation or abandonment. The individual is, therefore, no longer entitled to vote or receive compensation as a member of the state board of education. Further, pursuant to R.C. 3301.06, "the governor shall, within a period of thirty days, appoint a qualified person...to fill such

vacancy until the next general election at which members of the state board of education are elected."

Respectfully,

/s/ Lee Fisher

LEE FISHER

Attorney General

[Letterhead of Attorney General Anthony J. Celebrezze,Jr.]

January 8, 1991

OPINION NO. 91-001

Paul Brickner, President
State Board of Education
65 South Front Street
Columbus, Ohio 43266-0308

Dear President Brickner:

I have before me your request for my opinion regarding the qualifications for service on the State Board of Education under E.C. 3301.031. Specifically, you ask:

1. Does a person who serves as an Administrative Law Judge with the United States Social Security Administration hold a "public position of trust or profit" within the meaning of

Section 3301.031 of the Ohio Revised Code?

2. Is a person who serves as an Administrative Law Judge in the United States Social Security Administration eligible to contemporaneously serve as a member of the Ohio State Board of Education?

Members of the State Board of Education are elected pursuant to R.C. 3301.011. R.C. 3301.031, which establishes the qualifications of board members provides, inter aiia, that "[a] member of the board shall not during his term of office hold any other public position of trust or profit...."

Administrative law judges (ALJs) of the United States Social Security Administration are appointed by the Secretary of the department of Health and

Human Services pursuant to the authority granted in 5 U.S.C. §3105. They are members of the federal competitive civil service, see 5 U.S.C. §§2101, 2102; 5 C.F.R. §930.203, and are entitled to pay prescribed by the Office of Personnel Management, independent of the appointing agency's recommendations or ratings. See 5 U.S.C. §5372; 5 C.F.R. §930.210. The ALJs of the Social Security Administration adjudicate appeals of agency determinations regarding disability benefits under Titles II and XVI of the Social security Act, 42 U.S.C. §§401 et seq. and §§1381 et seq. See generally 20 C.F.R. §§404.929-404.961 (Title II hearings); 20 C.F.R. §§416.1429-416.141 (Title XVI hearings); 20 C.F.R. §§422.201-422.203 (describing general procedures for hearings before Social Security Administration ALJs). An

ALJ serves as the fact finder and decision-maker in these hearings and is empowered to "issue decisions within the requirements of the Administrative Procedures Act [(APA), 5 U.S.C. §§551 et set. and §§701 et seq.], which decisions are completely independent and final, signed only by him, and published to the parties in interest without prior review..." Association of Administrative Law Judges, Inc. v. Heckler, 594 F. Supp. 1132, 1141 (D.D.C. 1984) (Appendix, Position Description, Administrative Law Judge, Social Security Administration). The APA contains provisions designed to safeguard the decisional independent of ALJs from the agency for which they work. See, e.g., 5 U.S.C. §554(d) (ALJ may not be supervised or directed by officers or employees of agency involved in investigation or prosecution; ALJ my not

make ex parte contacts about facts of the case with anyone inside or outside of agency); 5 U.S.C. §3105 (ALJ may not perform agency duties inconsistent with judicial responsibilities); 5 U.S.C. §4301(2)(D) (ALJ exempted from performance appraisal systems applicable to other agency employees); 5 U.S.C. §5372 (salary not dependent on agency recommendations). Thus, while an ALJ is an employee of the appointing executive agency, the U.S. Supreme Court has described the role of an ALJ as "functionally comparable" to that of a federal judge. Butz v. Economou, 438 U.S. 478,513 (1978).

Your first question asks whether an ALJ for the Social Security Administration holds a "public position of trust or profit" within the meaning of R.C. 3301.031. As none of the terms

involved are expressly defined by state statute, I am guided by the rule of construction that, absent statutory definition, words should be accorded their common, everyday meaning. See generally State ex rel. Celebrezze v. Board of County Comm'rs, 32 Ohio St. 3d 24, 27, 512 N.E.2d 332, 334 (1987); Eastman v. State, 131 Ohio St. 1, 1 N.E.2d (1936)(syllabus, paragraph 5); R.C. 1.42.

I turn first to the meaning of "public." In the context of R.C. 3301.031, "public" clearly refers to the distinction between governmental and private positions. See generally Websters New World Dictionary 1148-49 (2d college ed. 1984) ("public...2. for the use or benefit of all; esp. supported by public funds [a public park]...4. acting in an official capacity on behalf of the

people as a whole [a public prosecutor];" "public servant an elected or appointed government official or a civil service employee"); Black's Law Dictionary 1227, 1229 (6th ed. 1990) ("public...pertaining to a state, nation, or a whole community;" "public authority, public agency, or any other political subdivision"). An ALJ for the Social Security Administration is clearly in a governmental position.

That the ALJ's position is with the federal government, rather than the state or a political subdivision thereof, does not render it any less public. I note that one of my predecessors, in determining that R.C. 3301.031 prohibits a state board member from serving as a representative to Congress, apparently believed it so obvious that "public" included all governmental positions that

he felt it unnecessary to discuss the issue of whether federal positions should be excluded from the scope of that prohibition. See 1960 Op. Att'y Gen. No. 1861, p. 715. Upon a closer examination of this issue, it is apparent, moreover, that R.C. 3301.031 does not contain any express language limiting the meaning of the word "public" and it cannot be argued that the state lacks authority to include federal positions within the meaning of "public" for purposes of R.C. 3301.031. while the state has no authority to establish job qualifications for federal offices or employments, the state clearly has authority to set qualifications for its own offices and employments. See generally Mason v. State ex rel. McCoy, 58 Ohio St. 102, 118 (1876). A federal officer or employee is just as bound to meet such requirements as any other

individual seeking to hold the state position. I am, therefore, constrained to construe the word "public" broadly, in accord with the principle of statutory construction that exceptions not made cannot be read into a statute. See generally Lima v. Cemetery Assoc., 42 Ohio St. 128 (1884).

I turn now to the meaning of the word "position." As I have already noted federal statutes and regulations refer to the job of ALJ as a position. See note 1, supra. This federal language is not dispositive, however, of whether an ALJ holds a "position" for purposes of R.C. 3301.031. Under Ohio law, whether an individual holding a public office or employment can simultaneously serve in another public capacity is sometimes expressly dependent on whether the second public function is an office or an

employment.[2] See, e.g., R.C. 3357.05 (technical college board members "shall not be employees of any governmental agency"); R.C. 141.04(D) (certain judges may not hold "any other office of trust or profit"). The word "position," however, in the context of describing a work rule, is defined as "a post of employment; office; job." Webster's New World Dictionary 1111 (2d college ed. 1984). Thus, by definition, the term "position" should ordinarily be construed to encompass both of these categories. See, e.g., 1981 Op. Att'y Gen. No. 81-078 at p. 2-307 (analysis of whether two public "positions" are compatible applies when two public offices or a public office and public employment are involved). Nonetheless, even when a statute has used the broader term "position," past opinions have sometimes

construed it to refer only to offices or to employments. See, e.g., 1990 Op. Att'y Gen. No. 90-014 (holding that, for purpose of R.C. 124.01(F), the term "position" does not include "offices"); 1961 Op. Att'y Gen. No. 2202, p. 238 (suggesting that the term "position" as used in R.C. 121.12, does not include "mere employment").

In examining whether the meaning of "position": should be limited for purposes of R.C. 3301.031, I find that these opinion do not dispute that, by general definition, both offices and employments are types of positions. Their holdings are based, instead, on a finding that, by express language or by application of the entire statutory scheme involved, the legislature has singled out one of these categories for different treatment than other types of

positions. In contrast, R.C. 3301.031 contains no such qualifications, either express or implied, on the meaning of the word position. I note, additionally, that R.C. 3301.031 states that "[a] member of the board shall not...hold any other public position." (Emphasis added). As elected officials with defined statutory duties, board members are themselves public officers. See generally State ex rel. Bricker v. Gessner, 129 Ohio St. 290, 293-94, 195 N.E. 63,65 (1935) (defining public office). Thus, the use of the word "other" indicates that the legislature intended to include offices in the types of position prohibited, see Webster's New World Dictionary 1007 (2d college ed. 1984) ("other...further or additional"), while use of the broader term "position" indicates an intent not to limit the

prohibition to offices alone, see generally Lake Shore Electric Ry. v. Public Utilities Comm'n, 115 Ohio St. 311, 319, 154 N.E. 239, 242 (1926) (had the legislature intended a term to have a particular meaning, "it would not have been difficult to find language which would express that purpose"). It is, therefore, not necessary for me to determine whether, under the principles applicable in Ohio law, an ALJ for the Social Security Administration holds an office or an employment, since, for purposes of R.C. 3301.031, either constitutes a "position."[3]

Having determined that an ALJ for the Social Security Administration hold a public position, I must next determine whether it is a public position of trust or profit. The powers and authority vested in a ALJ of the Social Security

Administration by federal statutes and regulations are clearly to be exercised for the benefit of the public rather than for personal gain. This duty to the public is at the heart of the concept of trust.[4] Positions involving the exercise of independent judicial authority have traditionally be regarded as involving a charge of public trust. See, e.g., 1990 Op. Att'y Gen. No. 90-089 (referee of a municipal court, a position administratively analogous to ALJ, holds an office of trust); 1969 Op. Att'y Gen. No. 69-131 (referees of the probate and domestic relations divisions of the court of common pleas hold offices of trust). The authority of an ALJ, who is part of the executive branch of government, is more properly termed "quasi-judicial." Given the decisional independence of the ALJ, however, I do not find this

distinction meaningful, with respect to characterizing the position as one of trust.

The term "profit" is defined as "advantage, gain, benefit." Webster's New World Dictionary 1135 (2d college ed. 1984). See also Black's Law Dictionary 524 (6th ed. 1990) ("Emolument...The profit arising from office, employment, or labor; that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites (emphasis added). Thus, positions involving compensation are recognized as positions of profit. See, e.g., 1986 Op. Att'y Gen. No. 86-002 at p. 2-6 n.2 (acting municipal judge); 1965 Op. Att'y Gen. No. 65-061 (municipal judge); 1960 Op. No. 1861 (representative to Congress). Accordingly, the position of ALJ for the

social Security Administration involves profit as well as trust.

For the above reasons, I conclude in answer to your first question, that an ALJ for the Social Security Administration holds a public position of trust or profit within the meaning of R.C. 3301.031. Based on this conclusion, the response to your second question is clear. R.C. 3301.031 expressly prohibits a member of the board from holding "any the public position of trust or profit" during his term of office. Past opinions have construed this language as prohibiting a board member from serving as a substitute municipal judge, a position involving the exercise of judicial authority, see 1960 Op. No. 1861. Thus, the language of the statute and past interpretation thereof compel the conclusion that a board member may

not simultaneously serve as an ALJ with the Social Security Administration.

It is, therefore, my opinion, and you are hereby advised that:

1. A person who serves as an Administrative Law Judge in the United States Social Security Administration holds a "public position of trust or profit" within the meaning of R.C. 3301.031.

2. R.C. 3301.031 prohibits a member of the Ohio State Board of Education from simultaneously serving as an Administrative Law Judge in the United States Social Security Administration.

Respectfully

/s/ Anthony J. Celebrezze, Jr.

ANTHONY J. CELEBREZZE, JR.

Attorney General

[1] 5 C.F.R. Part 930, Subpart B (Appointment, Pay, and Removal of ALJs) refers throughout to the "position" of ALJ. "Position," for purposes of federal civil service job classifications, is defined as "the work, consisting of the duties and responsibilities, assignable to an employee," 5 U.S.C. §5102(a)(3), and "employee" is defined as "an individual employed in or under an agency," 5 U.S.C. §5102(a)(2). Generally, for purposes of the federal civil service, the term employee includes both "officers," as statutorily defined at 5 U.S.C. §2104, and certain other appointive positions. See 5 U.S.C. §2105 (defining employee).

[2] The most important distinction between an office and an employment is the nature of the duties involved. "If official duties are prescribed by statute, and their performance involves the exercise of continuing independent, political or governmental functions, then the position is a public office and not an employment." State ex rel. Landis v. Board of Comm'rs, 95 Ohio St. 157, 159, 115 N.E. 919, 919 (1917). The statutory duties imposed must constitute part of the sovereignty of the state, which has been defined to include independent duties in relation to the exercise of the police power, independent power in the disposition of public property, power to incur financial obligations upon the government, and

power to act on behalf o the government in transactions between it an individuals. Id. at 160-161, 115 N.E. at 920. See also State ex rel. Bricker v. Gessner, 129 Ohio St. 290, 295, 195 N.E. 63, 65 (1935) (an office is a "position authorized by the organic law of the state, which prescribes the general duties to be performed" in which the officer "exercises independent prerogatives and is not amenable to superior authority"); State ex rel. [Attorney General] v. Brennan, 49 Ohio St. 33, 38, 29 N.E. 593, 594 (1892) (public office is a position "where, by virtue of law, a person is clothed, not as an incidental or transient authority, but for such time as denotes duration and continuance, with independent power

to control the property of the public, or with public functions to be exercised i the supposed interest of the people"). In contrast, a mere employment is characterized by lack of control over governmental actions taken or over public property, other than to use it as required in the course of employment. Employees "are subject on all occasions and in whatever they do in the course of their employment, to the direction and control of [a superior]." State ex rel. Attorney General vs. Jennings, 57 Ohio St. 416, 426, 49 N.E. 404, 406 (1898).

[3] I note, however, that the position of referee in various Ohio courts have been construed as an

office rather than an employment. See 1990 Op. Att'y Gen. No. 90-089 (referee of municipal court); 1969 Op. Att'y Gen. No. 69-131 (referees of probate and domestic relations divisions of the court of common pleas). Although such referees serve in the judicial branch of government, while ALJs are members of the executive branch, the two positions are clearly analogous in that both have authority to conduct hearings and that neither are full judgeships. The authority to adjudicate claims bestowed on an ALJ is even greater and more independent than that exercised by such referees. See, e.g., Ohio R. Civ. P. 53(C) (powers of referee subject to specifications and limitations stated in order of reference by

appointing court); Ohio R. Civ. P. 53(E)(5) (referee's report "effective and binding only when approved and entered as a matter of record by the court," which must enter its own judgment on the issues).

[4] The concept of trust is most commonly discussed in the context of public offices, which are inherently charges of public trust. See generally State ex rel Attorney General v. Hawkins, 44 Ohio St. 98, 109, 5 N.E. 228, 223 (1886) ("[t]he incumbent of a public office has not, under our system of government, any property in it. His right to exercise it is not based upon any contract or grant. It is conferred on him as a public trust to be

exercised for the benefit of the public"). The fiduciary duty conferred includes not only the obligation to administer actual property for the public benefit, in the more narrow legal sense of "trust, see, e.g., Crane Township ex rel. Stalter v. Secoy, 103 Ohio St. 258, 259-60, 132 N.E. 851, 851 (1921) ("public property and public money in the hands of or under the control of [a public] officer or officers constitute a trust fund, for which the official as trustee should be held responsible to the same degree as the trustee of a private trust"), but also the obligation to exercise the power and authority of the office in the public interest, see, e.g., State ex rel. [Attorney General] v. Brennan,

49 Ohio St. at 38, 29 N.E. at 594 (quoted as note 2, supra). Any public position, whether an office or not, involves some degree of responsibility to the public. The degree of responsibility necessary to raise the position to the level of a "position of trust" would appear to be related, as in the distinction between an office and an employment, to the degree of independence an individual has in the performance of the duties of that position.

OHIO LAW

Ohio Revised Code:

3301.031 Qualifications and salary of members

Each member of the state board of education shall be a qualified elector residing in the territory composing the district from which he is elected, and shall be nominated and elected to office as provided by Title XXXV of the Revised Code. A member of the board shall not during his term of office hold any other public position of trust or profit, or be an employee or officer of any public or private school, or a public or private college, university or other institution of higher education. Before entering on the duties of his office, each member shall subscribe to the official oath of office.

Each member of the state board of education shall be paid a salary fixed pursuant to division (J) of section 124.15 of the Revised Code, together with his actual and necessary expenses incurred while engaged in the performance of his official duties or in the conduct of authorized board business, and while en route to and from his home for such purposes.

THE 1851 CONSTITUTION OF THE STATE OF OHIO (with amendments to 1990) provided by Bob Taft, Secretary of State

ARTICLE II: LEGISLATIVE

§23 Impeachments; how instituted and conducted.

The House of Representatives shall have the sole power of impeachment, but a majority of the members elected must concur therein. Impeachments shall be tried by the Senate; and the senators,

when sitting for that purpose, shall be upon oath or affirmation to do justice according to law and evidence. No person shall be convicted without the concurrence of two-thirds of the senators.

§24 Who liable to impeachment, and punishment.

The governor, judges, and all state officers, may be impeached for any misdemeanor in office; but judgment shall not extend further than removal from office, and disqualification to hold any office under the authority of this state. The party impeached, whether convicted or not, shall be liable to indictment, trial and judgment according to law.

§38 Removal of officials.

Laws shall be passed providing for the prompt removal from office, upon complaint and hearing, of all officers,

including state officers, judges and members of the General Assembly, for any misconduct involving moral turpitude or for other cause provided by law; and this method of removal shall be in addition to impeachment or other method of removal authorized by the constitution.

ARTICLE IV: JUDICIAL

§2 The Supreme Court.

(B)(1) The Supreme Court shall have original jurisdiction in the following:

(a) Quo warranto;

§3 Court of appeals.

(B)(1) the courts of appeals shall have original jurisdiction in the following:

(B)(1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;

ARTICLE VI: EDUCATION

§4 State board of education.

There shall be a state board of education which shall be selected in such manner and for such terms as shall be provided by law. There shall be a superintendent of public instruction, who shall be appointed by the state board of education. The respective powers and duties of the board and of the superintendent shall be prescribed by law.

[Letterhead of Newcomer, Shaffer & Bird, Lawyers, Bryan, Ohio]

August 30, 1990

Hon. Paul Brickner, President
State Board of Education
Sent by fax to 1-216-942-5353

Dear Paul:

I have ben doing a little research on the question as to what constitutes a "public position". To my surprise, I find that there are many cases and at least one annotation in ALR. Apparently the GI Bill enacted after the Civil War gave certain privileges to honorably discharged union soldiers and sailors holding ga "public position". That led to some litigation on the subject. I am attaching copies of some of the cases and an ALR Annotation.

I have no intention of raising the question of your qualifications to hold

office so long as you do not renew your vendetta against the Superintendent and Department. Should you do so, however, I intend to raise the question as quickly and as effectively as possible.

I look forward to seeing you next week in Columbus.

Very truly yours,

/s/ Wayne E. Shaffer

Wayne E. Shaffer

Member

WES:EKW

Excerpt from Akron Beacon Journal, Sunday, Feb. 3, 1991:

"It was a threat, and I mean it as a threat," Shaffer said. "I felt it was my duty to do whatever I could to get rid of him."

[State Board of Education letterhead,
Paul Brickner, President
Franklin B. Walter, Secretary
Superintendent of Public Instruction]

October 17, 1990

Dr. Franklin B. Walter, Superintendent
65 South Front Street
Columbus, Ohio 43266-0308

Dear Frank,

I write regarding the $400,000.00 in funds that went to the Ashtabula JVS as a result of falsification of enrollment records and about problems with the agenda. An investigation found there was wrong-doing, but no criminal prosecution was initiated by the county prosecutor. This board is responsible to act.

I need not remind you that it is the role of the board president, not the superintendent, to approve and set the

agenda for our meetings. It is the role of the board to set policy, not the role of the superintendent. Unfortunately, your style has undermined the policy setting role of the board and has circumvented the agenda responsibilities of the president.

I am sure that the above matter, which has been [on] and off our agenda for nearly a year or more, will be at the top of this month's agenda. I am sure that you will provide the board with the information it needs to resolve this matter, including statements of the two superintendents and the treasurer and appropriate summaries of other factual data.

Very truly yours,

/s/ Paul Brickner

Paul Brickner

(B)

[Letterhead State Board of Education]

October 21, 1990

Franklin B. Walter
Superintendent of Public Instruction
65 S. Front Street
Columbus, Ohio 43266-0308

Dear Dr. Walter:

Long ago, nearly a year or longer, the board received a late Sunday night oral presentation informing us that through falsification of enrollment figures, the Ashtabula JVS received $400,000.00 in aid over and above what they were entitled to receive. The superintendents and a treasurer were involved.

To my recollection, the board has received no written presentation or summary of this matter. In addition, I

understand that the Auditor investigated this matter. I assume that you have the investigation report and request that you send me that report by the end of the this week or earlier. I have requested the statements of the three individuals involved. I understand that the treasurer signed a written statement, but that the superintendents did not sign statements, but that they did make oral statements. I asked you for these statements. You had legal counsel respond by sending me letters from attorney seeking to exculpate their clients. You told me, at our last meeting that you did not know what I was asking for. If there are no such statements, please advise me that there are no statements from the treasurer and from the superintendents.

Please also do not delay in getting an executive type summary ready for and out to the board members. I do not want them to receive their first written report of these matters at the last minute.

Very truly yours,

/s/ Paul Brickner

Paul Brickner

(C)

From: Paul Brickner, President
State Board of Education
4750 River Street
Willoughby, Ohio 44094

To: Franklin Walter, Superintendent
Department of Education
65 S. Front Street, Room 808
Columbus, Ohio 43266-0308

Date: January 3, 1991

Subject: Multiple Instances of Falsification or Irregularity of School Funding Claim Forms

After I faxed you two letters in October 1990 (17th and 21st) instructing that the matter of falsification of funding claims at the Ashtabula Joint Vocation School be placed first on our November agenda, the mater came on for discussion at 10:00PM on Sunday night.

At that time, I stated that I had heard of two other JVSs that had similar problems with falsification of funding claim forms and of a third JVS that had a problem involving wrongdoing and personal gain therefrom by a school official. In-house legal counsel confirmed that this latter item was alleged in a letter that she had sent me from an attorney representing one of the individuals involved in the Ashtabula JVS matter.

Although you were present, you remained silent. Some time afterwards you sent us information on the Belmont County JVS matter, involving more than $470,000 in false claims. Ashtabula JSV totaled over $400,000. I understand that problems exist also in the Tri-County JVS and at the Polaris JVS. Please reletter the Matters of Special interest to run A

through F and list as A, "False &/or Irregular School Funding Claims." Please then list Ashtabula JVS as having been the subject of action by the Board in November and then list Belmont and all other schools, whether JVS or not, that are having or have had similar types of problems. The Board must be fully apprised of these matters. A piecemeal or "on request" approach will not be satisfactory.

Ashtabula and Belmont approach $1,000,000 in false &/or irregular claims. This is a serious matter. Call if you have any questions.

Faxed early A.M. to 614-644-5960

[Letterhead State of Ohio, Department of Education, Columbus]

March 8, 1991

TO: The Honorable George V. Voinovich
Governor, State of Ohio

From: Franklin B. Walter
Superintendent of Public Instruction

re: Vacancy on the State Board of Education

As you know, there has been some controversy on the State Board over Paul Brickner. An Attorney General's opinion was sought by the Board on his eligibility to serve. That opinion, 1991 Op. Att'y Gen. No. 91-001, indicated that Mr. Brickner was not eligible to serve.

Lee Fisher has advised us that Mr. Brickner is not a member of the State

Board of Education. He has also advised us that pursuant to R.c. 3301.06, "the governor shall, within a period of thirty days, appoint a qualified person...to fill such vacancy until the next general election at which members of the state board of education are elected."

Pat Sweeney has introduced legislation which would amend the section that makes Mr. Brickner ineligible. According to the Attorney General, that law would not reinstate Mr. Brickner.

I am sorry to bring this to your attention, as I would much rather be dealing with improving student achievement, increasing the graduation rate, and grappling with the problems of management and finance.

FBW/sl

cc: Chester A. Roush, President, State Board of Education

[The Columbus Dispatch/Forum, Friday, September 13, 1991]

PURGE OF BRICKNER REEKS OF KREMLIN-STYLE TACTICS

"Swift unfair revenge struck a veteran state school board member who dared to ask awkward questions."

It was bad enough that Gov. George V. Voinovich and Attorney General Lee Fisher decided to play hardball with Paul Brickner's seat on the State Board of Education. Now the board is playing hard and dirty.

Besides showing an embarrassing lack of courtesy to a fellow elected official, board members have all taken it upon themselves to oust Brickner summarily without so much as a hearing.

Brickner's seat has been in contention for a year. He was board president last fall when others began

asking whether there was a conflict with his full-time job as an administrative law judge with the U.S. Social Security Administration. State law says state board members can have no other "public position of trust or profit."

The claims of conflict smelled from the beginning.

Brickner, 51, of Willoughby, has held his federal civil-service job since hew as first elected in 1982, but no one suggested there was a problem until he questioned Franklin B. Walter's conduct as state superintendent of public instruction.

Board member Wayne E. Shaffer wrote to brickner in August 1990 that he was researching "what constitutes a 'public position'" but would raise no questions if Brickner backed off from criticizing Walter and the state Department of

Education. He later admitted he intended that as a threat.

Brickner continued questioning Walter's handling of allegations of enrollment padding at several vocational schools.

With Brickner's concurrence, the board sought a legal opinion on whether his board position conflicted with his civil-service job.

Then-Attorney General Anthony J. Celebrezze Jr. interpreted the law in January to mean Brickner could not hold both positions. Fisher, Celebrezze's newly elected successor, went a step further in March and said Brickner's seat on the board could be considered vacant.

From then until the governor named a replacement in August, Brickner continued to attend board meetings and vote. Only the state auditor reacted

immediately; he halted Brickner's paychecks.

With no official action to remove the twice-elected board member, or even a courtesy call from the governor, Brickner learned from reporters that Voinovich was replacing him by naming Keith D. Hamilton, 52, of Painesville to the job Aug. 21.

Board members have all taken it upon themselves to oust Brickner summarily without so much as a hearing.

Two days later, board President Chester A. Roush sent a memo to other board members, casually mentioning Hamilton's appointment between two comments about Walter's "outstanding service" and an upcoming retirement dinner for the former superintendent.

Roush said that on Fisher's advice, he didn't send the memo to Brickner or

otherwise notify him that the board suddenly considered him persona non grata.

All this should have come to a head on Monday, the board's next regular public meeting after the governor dumped Brickner. Brickner had vowed to attend, claim his seat and vote.

Instead of a public hearing, the board held an unprecedented - and maybe illegal - Sunday-night meeting, huddled privately for a while and then voted publicly to seat Hamilton, 14-0, with two not voting and five abstaining.

The Roush refused Monday to allow a motion to seat brickner, too, pending resolution of a lawsuit he has filed.

Sunday's gathering was supposed to be a traditional, unofficial discussion session. A department press release the previous Thursday said no official action

would be taken until Monday. Roush, acting Superintendent William L. Phillis and Assistant Attorney General Lauren Ross all agreed on Friday that it would be Monday before anything official regarding the disputed seat would occur.

Never mind those assurances and the state Sunshine Law, which requires advance public notice of public meetings. To the surprise and over the objections of some members, the board returned from a dinner break Sunday night, after the press had left, and decided to convene an official meeting.

A book Fisher's office recently published on Ohio's open-meeting laws says, "No public body is permitted to hold an executive session for the discipline of an elected official...or for his removal from office."

Fisher's office contends there were no Sunshine Law violations. The time and place of Sunday's meeting were announced in advance, although it was "unfortunate" that the department said nothing official would take place until Monday, said Assistant Attorney General Shawn Nau.

Nau also said there was no removal action discussed in Sunday's secret, executive session. All the board did Sunday, in voting to seat Hamilton in Brickner's place, was to make "a procedural acknowledgment" of who represented the 11th Congressional District on the board, Nau said.

In fact, no one has done anything official to remove Brickner, Nau and Assistant Attorney General Christopher Cully contend.

In Brickner's court case, a federal judge criticized Voinovich and Fisher for

removing an elected official by simply naming a successor.

Even if their position is correct, such an approach "could lead to abuses," the judge said.

The governor's office said Voinovich was just acting on the advice of Fisher, the state's lawyer. Whatever legal advice the attorney general has given is confidential, but what the governor and board have done was legal, said Culley.

For a governor who has complained that he has no education authority, Voinovich seems to be exercising powerful influence by simply replacing a duly elected public official who never has been removed officially.

Voinovich's arrogance might hurt his effort to persuade the General Assembly to replace the elected state school board

with a smaller body the governor would appoint.

[The Star Beacon, Tuesday, June 4, 1991]

Editorial

THE BRICKNER AFFAIR

The questionable move to replace a state board of education member is indicative of the state Ohio's education finds itself in these days.

Gov. George Voinovich is trying to replace 11th District Board member Paul Brickner, who at one point was considering resigning because of an Ohio Attorney General's opinion that would not allow him to be a member of the board because he also is an administrative law judge with the Social Security Administration.

Brickner, who represents Ashtabula County, recanted his feelings about resigning when a measure was introduced into the Ohio legislature that would allow him to serve. At the moment that

legislation appears stalled, and so would seem to be the fate of Brickner except voinovich is believed to be pressing ahead in naming a replacement.

It remains a mystery as to why Voinovich is moving so swiftly to replace Brickner, who has serves as the 11th District representative for nine years. Such a move is questionable because Brickner is an elected official and Voinovich does not have the powers to remove him from office. If he is acting on the opinion of the attorney general then he is wrong here too because it is strictly an opinion and not binding.

It is possible removing Brickner is linked to a struggle between the board of education and state Superintendent & Franklin B. Walters. Part of that struggle centers around Walters not informing the board in a timely fashion

about problems that existed with the adult education program at the Ashtabula County Joint Vocational School. Brickner was the most vocal school board member in this struggle.

Even though he did not say so, that struggle may have led Walters to announce his resignation. It has been speculated by some that Brickner may be the "sacrificial lamb" as retribution for Walters being forced to leave.

Whatever, This episode illustrates how bad things are for education in this state. Some systems are at or near bankruptcy, students in some systems are forced to pay additional fees for extra-curricular activities, other systems are trimming curricula and the state is diverting millions of dollars that could help those curricula to pay for

proficiency tests for ninth graders, who benefits are unknown.

And "unknown" seems to be the best word that describes the course Ohio's education appears to be taking for the present and the future.

[The News-Herald, Thursday, Sept. 26, 1991]

BRICKNER'S TREATMENT BY VOINOVICH SHODDY

There is one aspect of the controversy surrounding Paul Brickner of Willoughby that a lot of people keep forgetting: He was elected to the state School Board by voters of the 11th Congressional District because they wanted him on the board. Period.

It was more than a little bit high-handed for Attorney General Lee Fisher to send down an opinion that Brickner can't serve on the board (he has been on it for eight years) because he is an administrative law judge for the U.S. Social Security Administration in cleveland (he has been for many years).

And it was equally high-handed for Governor Voinovich to kick him off the board when the voters put him there!

With that line of reasoning, can't we get rid of a lot of public officials that attorneys general and governors don't like?

There are others on the school board with worse conflicts that Brickner. The problem is that he is outspoken (not a bad quality) and he spoke out quite frequently about former Superintendent of Public Instruction Franklin B. Walter. Some of the practices Brickner accused Walter of (enrollment padding, hiring his son) were downright embarrassing. On the staid state school board, doing that is a no-no.

What happened was that Brickner got blind-sided by Walter supporters on the board. If he had kept his mouth shut he would have had no problems. But that is not his style.

He has appealed his "firing" by Voinovich and the matter will be settled in court.

The way in which the situation was handled is repugnant. Should the governor be allowed to remove an elected official from office, forcing him to go to court to prove he is qualified to hold that office?

It doesn't make sense.

But if that is the way Fisher and Voinovich are going to operate, there are a lot of other officials who come to mind they could <u>really</u> do the taxpayers a favor by axing.

[The Plain Dealer, Cleveland, Ohio, Wednesday, January 16, 1991]

SCHOOL BOARD MEMBER WON'T QUIT

COLUMBUS-State Board of Education member Paul Brickner said yesterday that he would not resign his position, despite a state attorney general's ruling that he is ineligible to hold office.

Brickner who had served as board president last year, had told other board members at a meeting Monday he planned to resign. But Cleveland-area state legislators urged him yesterday not to buckle under said Brickner.

The attorney general's opinion said Brickner could not serve on the on the board because he holds a position of public trust as administrative law judge in the federal Social Security Administration.

Brickner contends the state school board's request for the attorney general's opinion came eight years after he jointed the state school board only because he challenged Franklin B. Walter. Ohio's superintendent of public instruction.

"I have not submitted my resignation." Brickner said yesterday. "I intended to resign after the board meeting (Monday). But I have been urged by members of the legislature of different parties to stay on."

Rep. Patrick A. Sweeney of Cleveland, said he asked the legislative Service Commission to draft legislation that would allow Brickner to continue. Brickner has no conflict of interest between his federal job state education position, Sweeney said.

"We won't let him resign" Sweeney said. "This guy challenged the boss (Walter). Apparently, you are not allowed to do that on the state school board."

A court case or new legislation can overturn the attorney general's opinion, Sweeney said.